

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No 3818 of 1996

with

CRIMINAL MISC.APPLICATION No 4653 of 1996

For Approval and Signature:

Hon'ble MR.JUSTICE S.D.PANDIT

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

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MALVIKA STEEL COMPANY LIMITED

Versus

STATE OF GUJARAT

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Appearance:

1. Criminal Misc.Application No. 3818 of 1996  
SINGHI & BUCH ASSO. for Petitioners  
MR H.F.MEHTA, A.P.P. for Respondent No. 1  
MR NITIN M AMIN for Respondent No. 2
2. Criminal Misc.ApplicationNo 4653 of 1996  
SINGHI & BUCH ASSO. for Petitioners  
MR H.F.MEHTA, A.P.P. for Respondent No. 1  
MR NITIN M AMIN for Respondent No. 2

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CORAM : MR.JUSTICE S.D.PANDIT

Date of decision: 07/11/96

ORAL JUDGEMENT

Rule.

I have heard both the sides at length at this stage on merits and after giving sufficient opportunity to both the sides to produce material as well as make submission in support of their rival contentions. I, therefore, proceed to dispose of this petition finally.

2. The present petition is filed by the accused No.1 to 14 in Criminal Case No.2276 of 1996 on the file of the Metropolitan Magistrate Court No.9 at Ahmedabad. By this petition the petitioners want me to quash the said criminal prosecution.

3. The said Criminal Case No.2276 of 1996 is filed by Shri Himanshu H. Chokshi-respondent No.2 by lodging a private complaint against the present petitioners. It is the case of the respondent No.2-original complainant that the petitioner No.1- accused No.1 had decided to make public issue of 5,70,000/- equity shares of the denomination of Rs.10/- each at a premium of Rs.30/- per share in April 1995 and the said company had appointed (1) Interface Capital Markets Pvt.Ltd (2) Mr.Himal K.Parekh and (3) Chartered Capital and Investment (P) Ltd. as underwriters alongwith others for the said public issue. The said public issue was open on 20th April, 1995 and was closed on 25th April, 1995, but the issue was not fully subscribed, and, therefore, the petitioner No.1-company informed the said 3 underwriters by their letter dated 14th May, 1995 to fulfil their liabilities under Under Writing Agreement between the parties. The said 3 underwriters were liable to procure the investment for 1,52,000/- equity shares. It is further alleged by the complainant- respondent No.2 that thereafter those 3 under writers approached him on 14th June, 1995 and requested him to apply for 1,52,000/equity shares. He accordingly made the application and also made payment through stock invest of the amount of

Rs.15,22,000/- for getting the equity shares of 1,52,000/-. It is his further complaint that though the petitioner No.1- company received the said stock investment by bank draft of Rs.15,22,000/-, they had not allotted any share to the respondent No.2-complainant and have illegally encashed stock invest and thereby have committed misappropriation. The complainant has further alleged that the said under writers had informed the accused No.1-company that he was insisting to get the shares allotted to him in his name as applied by him and

that he would not accept other's shares though the accused No.1 was ready to allot the shares of others. But inspite of this, no shares were allotted to the complainant and by encashing the stock invest, the accused have committed misappropriation as well as cheating. The accused Nos. 2 to 14 are the directors of accused No.1-company and it is alleged by the complainant that they are in management and organisation of the said company, and, therefore, they are made accused. The complainant sought conviction of the accused under Section 420, 409, 34 and 114 of the Indian Penal Code. The learned Metropolitan Magistrate after recording the statement of the complainant on oath was pleased to issue process against the petitioners under Section 420 read with Section 34 of the Indian Penal Code.

4. It is submitted before me on behalf of the petitioners that the dispute between the parties is a civil dispute and the recourse to criminal prosecution is unjustified, the criminal prosecution is a clear abuse of

process of law, and, therefore, on that count, the prosecution in question should be quashed. The second ground for quashing the proceeding is that the Metropolitan Magistrate of Ahmedabad has no jurisdiction to entertain the prosecution and consequently taking of the cognizance by the Metropolitan Magistrate is illegal and hence the prosecution is liable to be quashed. The third contention raised is that all the accused-petitioners are wrongly involved as accused in this case merely because the petitioners Nos. 2 to 14 original accused Nos.2 to 14 are directors, they could [ not be made accused without making averments of specific action committed by them towards the alleged offence.

5. I am considering the present petition under Section 482 of the Code of Criminal Procedure, and, therefore, it is necessary for me to bear in mind that I cannot have the appreciation of the evidence on record and I have to accept the averments made in the complaint by giving the face value to the said averments. The quashing of proceeding is to take place if the prosecution in question is a clear abuse of process of law. Therefore, bearing this aspect in mind, I consider the complaint in question and the claim made by the petitioners before me. The complainant has averred in para No.3, 4, 10 and 11 as under :

3. The said Public Issue had opened on 20 th April, 1995 and closed on 25 th April, 1995. As the Issue was not fully subscribed the Accused

No.1 Company informed the abovesaid underwriters by letters dated 14 th May, 1995, of their liability under the underwriting agreements. The

total liability of the abovesaid underwriters under the underwriting agreement was for 1,52,000 Equity Shares.

4. The abovesaid 3 underwriters approached the complainant on 14 th June, 1995, with letter of the accused No.1 Company and requested the Complainant to apply for 1,52,000 Equity Shares of the Accused No.1 Company as represented and stated in various letters of the Accused No.1 Company and particularly in the letter dated 14th June, 1995.

10. On or around the August, 5th, 1995 the Accused informed the underwriter interface Capital Market Pvt.Ltd.( hereinafter referred to as the abovesaid Underwriters ) that the allotment of shares applied for by the Complainant was not possible as the allotment was completed and that the Accused could arrange delivery of other shares from the market.

11. But the Complainant was not prepared to accept somebody else's shares and so he instructed the said Underwriter to inform the accused that the complainant was insisting to get the shares that were to be allotted to him in his name as applied by him and if the accused could not so allot the shares to the complainant, the Accused should return the application form alongwith the stock-Invest and discharge certificate.

Now if the above averments made by the complainant in his complaint is considered, then the 3 underwriters namely (1) Interface Capital Markets Pvt.Ltd. (2) Himal K. Parekh and (3) Chartered Capital and Investment (P) Ltd.had approached the complainant on 14th June, 1995. The complainant has also clearly admitted in the complaint that the public issue of the petitioner No.1-company was opened on 20th April, 1995 and was closed on 25th April, 1995. He has also admitted that by their letter dtd. 14th May, 1995, the company had threatened the said 3 underwriters to fulfil their liabilities under the underwriting agreements or to face the consequences for non-fulfilment of the same. It is further his claim that as per the said approach of those

3 underwriters on 14th June, 1995, he gave the application as well as the draft of the stock investment to those 3 underwriters on 15th June, 1995. It is very pertinent to note that in the complaint, the complainant nowhere says that complainant had ever direct correspondence with the present petitioner No.1-company for getting the shares in question. From his averments in his complaint, it would be quite clear that those 3 underwriters had approached the complainant after the public issue was closed and the underwriters were threatened with the consequences on non-fulfilment of their liabilities under the underwriting contracts and they were to fulfil those liabilities on or before 15th June, 1995 and inspite of this, he has entered with the transaction in question with those 3 underwriters as per his own claim on 14th June, 1995. The petitioners have produced a letter sent by those 3 underwriters to the petitioner No.1 dated 15th June, 1995. In the said letter subject is mentioned as under:

Payment of underwriting obligations in respect of  
INTERFACE CAPITAL MARKETS PVT. LTD ( BROKER CODE  
NO.02-0005- 1 ) HIMAL K PARIKH ( BROKER CODE NO.  
07-0292-4 ) & CHARTERED CAPITAL INVESTMENT PVT  
LTD.

and then it has been mentioned as under :

We enclose herewith your Application form  
No.5314687 in the name of HIMANSHU H. CHOKSHI,  
alongwith a Stock Invest No.282447 dated 15/05/95  
of the BANK OF MAHARASHTRA, Bhadra Branch,  
Ahmedabad, drawn in your favour, for  
Rs.15,22,000/- ( Rupees Fifteen Lacs Twenty Two  
Thousand Only) being the application money @ of  
Rs.10/ per share for 1,52,200 shares towards  
payment of underwriting obligations in respect of  
INTERFACE CAPITAL MARKETS PVT.LTD ( BROKER CODE

NO.02-0005-1 ), HIMAL K. PARIKH ( BROKER CODE  
NO. 02-0292-4 ) 7 CHARTERED CAPITAL & INVESTMENT  
PVT. LTD.

Thus, it would be quite clear from the averments made by the complainant in his complaint as well as from the above quoted letter that the complainant was approached by those 3 underwriters and the transaction between the underwriters and the present complainant. The material

on record further shows that after getting the said letter, the underwriters were informed that the said money as well as their letter was received after the due date and consequently there could not be allotment of primary shares. The complainant has admitted this position of the accused No.1 informing those 3 underwriters about their inability to give primary shares in para No.10 of his complaint. No doubt, in para 11 of his complaint, he has stated that the said 3 underwriters had informed the petitioner No.1-company that the complainant was insisting to get the shares allotted in his name and not from the market. The material on record further shows that admittedly thereafter the company in question had send 1,52,000 shares alongwith their letter dated 31st August, 1995 to the present petitioners. The dispute between the parties is only as regards whether the complainant ought to have been given primary shares or secondary shares. No doubt, the complainant is insisting that he ought to have been given primary shares and he had applied for primary shares, but it must be remembered that the complainant had applied for the said primary shares through underwriters and it is the claim of the company that the said application had been received after the last date. As the said application

was received after the last date, they were not in a position to allot the primary shares. No doubt, the said underwriters have informed as claimed by the complainant to the petitioner No.1 company that the complainant was insisting for primary shares. That would be also quite clear from the letter dated 5th August,1995 which is produced at page 105. Even if the said letter is taken into consideration, then it would be quite clear that before that letter, there were telephonic discussion between the parties and the problem was to be sorted out jointly by the company underwriters alongwith the present petitioners. Now inspite of all these things known to the complainant, the complainant has lodged the present prosecution without making those 3 underwriters as accused. If at all there is any cheating as claimed by the complainant, then as per his own allegations, complainant was approached by those 3 underwriters. The application form was handedover by those 3 underwriters After signing and filling the said form and the stock investment and handed over by the complainant to the said 3 underwriters and the underwriters were to deliver him the primary shares. But inspite of this, the complainant has not joined those 3 underwriters as accused. He has not joined those 3 underwriters as accused, but he has also not lodged any action against those 3 underwriters in his complaint. The underwriters had obtained the

application from the present petitioners in order to fulfill their own obligation as underwriters and the application and investment of the present complainant was utilised by the

underwriters towards their own fulfilment of the underwriting obligation and when the complainant does not say that they have not done any criminal acts and when there were dispute between the parties as to whether the application of the present respondent No.2complainant was received on the last date or not and whether he was entitled to only primary shares or not are the questions which could be gone into a civil proceedings between the parties. It must be remembered that it is not a case that no share is allotted to the complainant. The secondary shares i.e. shares from open market had been allotted to the complainant. The dispute between the parties is whether the complainant is entitled to only primary shares and whether he is not bound to accept the secondary shares allotted to him by the petitioner No.1-company for that dispute the recourse to the criminal prosecution could not be said to be a proper proceeding. It is very pertinent to note that the persons through whom the complainant had transaction in question were saying that the dispute in question will have to be sorted out and for that purpose, the complainant could not have recourse to criminal prosecution particularly without joining those 3 underwriters. When the complainant, knowing fully well that underwriters were threatened that action for non-fulfilment of their obligation as underwriters, has entered into the transaction with those underwriters and

not alongwith the petitioner No.1, then the criminal action of the complainant could not be said to be honest and bonafide one.

6. In view of the facts stated in the complaint and the material on record, it would be quite clear that there is a dispute of a fact that is whether application and investment of the complainant was received on the last date of the allotment of the share or not, then there is a dispute as to whether the complainant is entitled to get only primary shares and that he is not bound to accept secondary shares allotted to him. Now this dispute could be gone into only in a civil proceeding between the parties and not by a criminal prosecution. At the cost of repeatation it must be mentioned that the complainant had never made any claim directly with the company and the company has shown the

readiness and willingness to supply number of shares as applied by him in the application. When the dispute between the parties is of a civil nature, the recourse to criminal prosecution would amount to abuse of process of law as has been held by the Appex Court in the case of Trilok Singh and others, v. Satya Deo Tripathi, A.I.R. 1979, Supreme Court, 805 wherein it has been held when the dispute raised by the complainant was purely of civil nature, even assuming the facts to be substantially correct, the recourse to criminal prosecution could not be upheld and the prosecution deserves to be quashed. Similarly in the case of

Madhavrao Jiwaji Rao Scindia and another . Sambhajirao Chandrojirao Angre and others, A.I.R. 1988 Supreme Court, 709 the head note is running as under :

A case of breach of trust is both a civil wrong and a criminal offence. There would be certain situations where it would predominantly be a civil wrong and may or may not amount to a criminal offence. In the instant case, a complaint was filed for offences punishable under Ss. 406, 467 read with Ss. 34 and 120 B of the Penal Code. The property was trust property and one of the trustees was member of the settlor's family. The criminal proceedings were quashed by High Court in respect of two persons but they were allowed to be continued against the rest. It was held that the case in question was one of that type where, it at all, the facts may constitute a civil wrong and the ingredients of the criminal offences are wanting. Therefore, the criminal proceeding had to be quashed.

In the instant case when the complainant is offered secondary shares from the market of the value of the amount given by him, it is very difficult to uphold that there is any criminal breach of trust though it may happen that in a civil proceeding it could be upheld that there was a civil breach of trust.

7. The learned advocate for the petitioners has urged before me that the court of Ahmedabad has not jurisdiction and in support of that contention of him, he has cited before me the case of . Satwant Singh v. The State of Punjab, A.I.R. 1960, Supreme Court, 266 and has put reliance on the following head notes :

After evacuation of Burma its Government



was located at Simla. In August, 1942 the Government of Burma advertised inviting claims from contractors who had executed works or had supplied materials in Burma and had not yet been paid. The accused had worked as a contractor in

Burma. He submitted his claims. These claims were sent by the Government of Burma to one Major Henderson at Jhansi in March and May, 1943 for verification as he was the officer who had knowledge of these matters. This officer certified many of these claims to be correct and sent the papers back to . On the certification of the claims by Henderson, the Finance Department of the Government of Burma sanctioned the same and the Controller of the Military Claims at Kolhapur was directed to pay the amounts sanctioned. On the request of the accused cheques drawn on the Imperial Bank of India at Lahore were posted to him from Kolhapur and these cheques were encashed at Lahore. The charge framed against the accused stated that he had committed the offence of cheating at Simla and Kolhapur. Kolhapur was a place outside British India at the relevant time :

Held that it was an error in the charge,

as framed, to have mentioned that any offence of cheating took place at Kolhapur. That error in the charge, however, was a mere irregularity on a misunderstanding of the facts which could not vitiate the trial. The posting of the at Kolhapur could not be regarded as delivery of the cheques to the accused at Kolhapur because the Post Office at that place could not be treated, in the circumstances of the present case, as the agent of the accused to whom the delivery of the cheques had been made. In fact, they were not delivered to the accused at Kolhapur but were delivered to him at Lahore. The misrepresentation by accused was at Simla and the false certification of the claims as true by Henderson was at Jhansi. Simla and Jhansi were places in British India. As the result of the misrepresentation by the accused and the false certification by Henderson the Government of Burma was induced thereby to make the payment of a large sum of money to the accused at Lahore. The payment at Lahore to the accused was made at his own request by cheques on the Imperial Bank of India at its Lahore Branch. Lahore was also a place at the relevant time in British India. No part of the offence of cheating was committed by the accused outside British India. As the

offence committed by the accused was not at a place beyond British India, there was no need for the existence of a certificate of a political agent or in the absence of such a person, a sanction of the Provincial Government.

The above head notes itself clearly shows that on facts the said case is not applicable on case before me. Here as per the case of the complainant, the application for share was handedover to the complainant at Ahmedabad by the 3 underwriters of the present petitioner No.1 and

those underwriters had received the said application form alongwith the stock investment from him at Ahmedabad and the same was forwarded to the petitioner No.1 at his head office. Now the accepting of that amount was by the underwriters of the petitioner No.1- company at Ahmedabad. No doubt, the learned Magistrate has issued process under Section 420 of IPC, but in view of the material on record, it is very difficult to uphold that there is any offence punishable under Section 420 of IPC. Even accepting that conclusion to which I have arrived at may not happen to be accepted by the Appex Court, then the offence that could be said to have been disclosed would be only under Section 406 and 408 of IPC and the amount having been handedover at Ahmedabad and the amount was to be returned to the complainant at Ahmedabad. For non-issuance of the primary shares, the court of Ahmedabad will be having the jurisdiction. Therefore, had I come to the conclusion that the prosecution in question need not be quashed, then I would not have accepted the contention raised on behalf of the petitioner that the Ahmedabad court has no jurisdiction.

8. Now as regards accused Nos.2 to 14, they are admittedly joined as accused. They are directors of accused No.1. The offence said to have been committed under the Indian Penal Code as indicated above the offence punishable under Section 408. Now if the definition of person given in Section 11 of the Indian Penal Code is seen, then it would be quite clear that the word " person " includes a company. Now if the provision of Section 5 of the Companies Act, 1956 considered, then it would be quite clear that when a company commits a default or a offence, the Managing Director or the Managing Director overtime Director, the Manager and the Secretary would be responsible. Now the description of the accused given in the complaint the petitioner No.1 is a company and the petitioner No.2 is its Chairman and petitioner No.3 is its Vice Chairman and Managing Director, the other petitioners Nos. 4 to 14 i.e. the

original accused No.4 to 14 are mere directors. Therefore, the prosecution could be only of accused Nos. 1 to 3 i.e. petitioners Nos. 1 to 3 and had I come to the conclusion that the prosecution in question need not be quashed, then in that case I would have quashed the prosecution against the petitioners Nos. 4 to 14.

9. Thus, I hold that the prosecution in question is a prosecution for civil dispute and consequently the same will have to be quashed. I, therefore, allow the present petition and I quash and set aside criminal prosecution against the accused Nos. 1 to 14 i.e. petitioners Nos. 1 to 14. Thus, rule is made absolute accordingly.

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